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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES A. MACOVE

Appeal 2009-009633
Application 10/750,244
Technology Center 3700

Before JENNIFER D. BAHR, JOHN C. KERINS, and KEN B. BARRETT,
Administrative Patent Judges.

KERINS, *Administrative Patent Judge.*

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

James A. Macove (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 21, 22, 24-27, 30-32 and 40-44, the only claims currently pending in the application. Claims 1-20, 23, 28, 29, 33-39 and 45 were previously canceled. We have jurisdiction under 35 U.S.C. § 6(b) (2002). An oral hearing was held on February 8, 2011, with Ronald E. Cahill, Esq., appearing on behalf of Appellant.

We AFFIRM.

THE INVENTION

Appellant's claimed invention is to a razor cartridge and razor system that provide first and second blade groups for broad area and trim shaving, respectively. Claims 21, 30 and 41, reproduced below with emphasis added, are illustrative of the claimed subject matter:

21. A single razor cartridge for use with a handle for providing both broad area shaving and trim shaving blade groups within the single cartridge, comprising:

the razor cartridge defining a handle axis;

a first blade group provided on the razor cartridge and having a plurality of razor blades configured to provide broad area shaving in a first working plane, the first working plane being defined by a blade platform having leading and trailing glide surfaces, wherein the first working plane intersects the handle axis and the plurality of razor blades in the first blade group are angled at an acute angle with respect to the first working plane in a direction of broad area shaving; and

a second blade group provided on the razor cartridge and having at least one razor blade configured to provide trim shaving in a second working plane, the second working plane being defined by a blade platform having leading and trailing glide surfaces, wherein the second working plane intersects the handle axis and the at least one razor blade in the second blade group is angled at an acute angle with respect to the second working plane in a direction of trim shaving;

wherein the first and second working planes intersect each other so as to define a line of intersection that is substantially transverse to the handle axis and the first and second working planes intersect at an included angle between about 75 degrees and 135 degrees.

30. The razor cartridge of claim 25, wherein the handle is elongated and has a curve at an end attached to the razor cartridge, the curve being concave on the same side as the first blade group.

41. A razor system for providing both broad area shaving and trim shaving blade groups within a single cartridge, comprising:

an elongate handle defining a handle axis; and

the razor cartridge disposed on the handle and having:

a first blade group having a plurality of razor blades configured to provide broad area shaving in a first working plane, the first working plane being defined by a blade platform having leading and trailing glide surfaces, the first working plane intersecting the handle axis and the plurality of razor blades being provided at an acute angle to

the first working plane in a direction of broad area shaving; and

a second blade group having at least one razor blade configured to provide trim shaving in a second working plane, the second working plane being defined by a blade platform having leading and trailing surfaces, the second working plane intersecting the handle axis and the at least one razor blade being provided at an acute angle to the second working plane in a direction of trim shaving;

wherein the first and second working planes intersect each other so as to define a line of intersection that is substantially transverse to the handle axis and the first and second working planes intersect at an included angle between about 0 degrees and 150 degrees; and

wherein the second blade group further includes a blade platform and a leading-edge blade guard, the blade platform and blade guard being provided along with the at least one razor blade on the second working plane, *the leading-edge blade guard having a thin profile to allow a distance between the at least one razor blade and an individual's skin to be optimally minimized to facilitate shaving in confined hard-to-reach areas of the individual's skin.*

THE REJECTIONS

The Examiner has rejected:

- (i) claims 40-44 under 35 U.S.C. § 112, second paragraph, as being indefinite;

(ii) claims 21, 22, 24-27, 30-32 and 40 under 35 U.S.C. § 103(a) as being unpatentable over Rozenkranc (US 6,276,061 B1, issued August 21, 2001) in view of Gerasimov (WO 94/26476, published November 24, 1994); and

(iii) claims 41-44 under 35 U.S.C. § 102(b) as being anticipated by Rozenkranc.

ISSUES

Has the Examiner correctly concluded that the recitation in claim 41 of “wherein the second blade group further includes a blade platform”, in light of a prior recitation of the second working plane “being defined by a blade platform,” renders that claim indefinite?

Has the Examiner correctly concluded that the subject matter of claim 21, in particular the limitation that an included angle formed by the intersection of the two working planes is between about 75° and 135°, would have been obvious to a person of ordinary skill in the art?

Has the Examiner correctly concluded that the subject matter of claim 30 would have been obvious to a person of ordinary skill in the art?

Has the Examiner correctly found that the Rozenkranc patent discloses a second blade group having a thin-profile leading edge blade guard?

ANALYSIS

Claims 40-44--35 U.S.C. § 112, second paragraph--Indefiniteness

The Examiner found that the reference in claim 41 to “a blade platform” in the expression, “wherein the second blade group further includes a blade platform and a leading-edge blade guard”, rendered the

claim indefinite in that it was unclear whether this is or is not the same structure as recited previously in the claim, which calls for the second blade group to have a second working plane “being defined by a blade platform having leading and trailing glide surfaces”. (Ans. 3; Appeal Br., Claims Appendix 28). Appellant, as noted at page 24 of the Appeal Brief, sought to overcome this rejection by filing an Amendment Pursuant to 37 C.F.R. § 41.33 subsequent to the filing of the Notice of Appeal, but prior to the filing of the Appeal Brief. The amendment to claim 41 proposed therein by Appellant removed the second occurrence of the term “a blade platform” that the Examiner had objected to.

Our review of the prosecution file history failed to turn up an Advisory Action or any other paper entering the Amendment for the purposes of appeal pursuant to 37 C.F.R. §§ 41.33 and 1.116. The Examiner, on the other hand, notes that claim 41 as presented in the Claims Appendix to the Appeal Brief does not incorporate the proposed changes, but that “this discrepancy does not effect [sic] the art rejection.” (Ans. 2-3). This would, at first blush, suggest that the Examiner regarded the amendment as having been entered. Nonetheless, the Examiner thereafter maintained the rejection under 35 U.S.C. § 112, second paragraph, the stated basis for the rejection being directed to claim 41 as it stood prior to the proposed amendment. (Ans. 3).

Lacking a definitive action in the file history entering the amendment, and noting that entry of such an amendment is not as a matter of right, but instead is required to meet certain conditions set forth in §§ 41.33 and 1.116, we will take up the issue of indefiniteness on the basis of the unamended claim. When a claim is amenable to two plausible interpretations, a

rejection under 35 U.S.C. § 112, second paragraph, for indefiniteness, is appropriate. *Ex parte Miyazaki*, 89 USPQ2d 1207 (BPAI 2008). The Examiner's stated uncertainty as to whether the later-recited blade platform is or is not the same structure as the previously-recited blade platform is well-founded and results in claim 41 having two plausible interpretations. The rejection of claim 41 as indefinite will thus be sustained.

Claims 21, 22, 24-27, 30-32 and 40--Obviousness--Rozenkranc/Gerasimov

Appellant argues separately for the patentability of claim 30. The remaining claims are argued as a group, and we will take claim 21 as being representative of that group.

The issue joined with respect to claim 21 is whether the claimed subject matter having "the first and second working planes intersect at an included angle between about 75 degrees and 135 degrees" would have been obvious over the Rozenkranc disclosure, with Gerasimov being cited as alleged evidence that it is old and well known in the art to alter the angle of intersection of two working planes on a double-sided razor cartridge.

The Examiner maintains that the construction illustrated in Rozenkranc shows the included angle of intersection of the working planes as being roughly 60°, with the angle of intersection between the planes in which the first and second set of blades lie being roughly 90°. (Ans. 9-10). The Examiner further notes that Rozenkranc discloses that the angle of intersection of the blade planes, while advantageously being between 85-95°, is suitably between 60-120°. (Ans. 10; Rozenkranc, col. 1, ll. 59-63). The Examiner thus reasons that it would have been obvious to construct the Rozenkranc device to employ the 120° configuration, and that the person of ordinary skill in the art would recognize that the angles between the blades

and their respective working planes would remain the same. (Ans. 9). Thus, according to the Examiner, increasing the angle of intersection of the blade planes by approximately 30° would also increase the angle of intersection of the working planes by the same amount. (Ans. 10). The resulting structure, according to the Examiner, would have an angle of intersection of the working planes within the claimed 75-135° range, presumably roughly 90° (roughly 60° in Figure 1, increased by 30°). (*Id.*).

Appellant counters that the Examiner’s “assumption” that the angles between the blades and their respective working plane would remain the same in reconfiguring the Rozenkranc cartridge to provide a 120° angle of intersection of the blade planes is not supported by Rozenkranc, in that Rozenkranc never states that the angles should remain fixed. (Reply Br. 5). The Examiner did not, however, contend that Rozenkranc explicitly disclosed this. Rather, the Examiner concluded, as noted above, that a person of ordinary skill in the art would have recognized that the individual blade angles relative to their respective working planes would remain the same.

Moreover, while Rozenkranc does not specify what the individual blade angles relative to the working plane should be, there is at least a recognition that the angle is of some significance, in stating that, “[t]he trim blade is located at an adequate angle enabling a good trim, similar to the angle at which the shaving blades are located when the shaving is performed.” (Rozenkranc, col. 1, ll. 59-61). Given this disclosure, the Examiner’s position that the blade angles relative to the working planes would remain the same is not seen as being unreasonable, and indeed would seemingly be the most reasonable approach, in that the person of ordinary

skill in the art would want to maintain the “adequate” angles for trimming and broad shaving.

Appellant further contends that there is no rationale for modifying Rozenkranc, and, seemingly, that the disclosure of the advantageous 85-95° angle between the blade planes teaches away from the “suitable” 120° angle which the Examiner relies on, because the advantageous 85-95° configuration is “very different from” the 120° configuration. The proposed “modification” of Rozenkranc is a modification to the illustrated preferred and advantageous embodiment. The “modification” to expand the angle of intersection between the blade planes to 120° is fully within the scope of the Rozenkranc disclosure. (Rozenkranc, col. 1, ll. 61-63). As such, the rationale for the Examiner’s proposal is within the four corners of Rozenkranc itself. We further fail to see how a configuration that is disclosed as being suitable is taught away from simply because a different configuration is described as being advantageous.

Appellant’s final argument in this regard is that the Examiner recognized that the drawings of Rozenkranc are not disclosed as being to scale, and therefore cannot be relied on for exact dimensions, yet the Examiner did exactly that in finding that the Rozenkranc device with the increased angle of intersection of the blade planes from approximately 90° as shown to 120° as disclosed, would have an included angle of intersection of the working planes within Appellant’s claimed range. (Reply Br. 5). It is not contested by the Examiner that resort must be had to Figure 1 of Rozenkranc for any disclosure of the included angle of intersection of the working planes of that device.

While we are mindful that our reviewing court has cautioned that patent drawings not designated as being drawn to scale cannot be relied upon to define precise proportions of elements if the specification is completely silent on the issue, *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000), that does not mean, “that things patent drawings show clearly are to be *disregarded*.” *In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972).

We do not find the *Hockerson-Halberstadt* decision to be closest on point to the situation presented here. In that case, our reviewing court precluded a patentee from escaping a prosecution history estoppel situation, involving claim construction, by refusing to allow the patentee to rely on its own patent drawings as evidencing that a statement made during prosecution, giving rise to the estoppel, was erroneous. *Hockerson-Halberstadt*, 222 F.3d at 956. Rather, the Court held that persons of ordinary skill in the art, being aware that figures in a patent are not drawn to scale unless otherwise indicated, would understand the arguments in the prosecution history as clearly disclaiming a groove having a width greater than the combined width of the fins, regardless of the fact that the drawings included embodiments illustrating such a groove/fin relationship. *Id.* In effect, the Court refused to grant the patentee a “mulligan” absent clear evidence that the arguments were completely contrary to what the patent disclosed, so as to maintain the integrity of the public notice function provided by the patent and its prosecution history. *Id.* at 957.

In re Wright, 569 F.2d 1124 (CCPA 1977), and *Nystrom v. TREX Co.,* 424 F.3d 1136 (Fed. Cir. 2005), serve as additional precedent for the proposition that it is error to rely on that which is illustrated in the drawings

as disclosing precise proportions or particular sizes of elements so illustrated if the specification is completely silent as to such proportions or sizes. In *Wright*, the CCPA found unpersuasive arguments that a comparison of the application drawings to those in a prior art patent showed that a chime length of a whiskey barrel in the latter would be roughly $\frac{1}{2}$ to 1 inch in length. *Wright*, 569 F.2d at 1127. The Court there cautioned that arguments based on measurements obtained from patent drawings are regarded as having little value where the patent does not disclose that the drawings are to scale and absent any disclosure of quantitative values. *Id.* In *Nystrom*, the Federal Circuit reversed a judgment of invalidity that was founded upon evidence in the form of computer-generated models of deck boards illustrated in a prior art patent, and computations performed on those models to determine a curvature-to-width ratio of the boards. *Nystrom*, 424 F.3d at 1148. In effect, these cases involved considerable and careful evaluation of illustrations in prior art references in order to demonstrate that the prior art met a dimensional limitation of a claim. Findings or conclusions based upon such evaluation were disfavored or assigned little weight when the prior art references lacked explicit disclosure that the drawings are to scale or that the particular elements at issue possessed some dimensional relationship.

We find the *Mraz* decision to be more on point than both the *Wright* and *Nystrom* cases. The *Mraz* case involved a claim that included an edging roll having a groove therein formed by inwardly converging inclined surfaces, with the angle of the inclines not exceeding 15°. *Mraz*, 435 F.2d at 1070. A prior art reference to *Wilson*, asserted to disclose this claim feature, and illustrating (but not explicitly disclosing in writing) an angle of

incline of about 6°², was characterized by the Court as, “focus[ing] on the edge rolls, showing them with great particularity and showing the grooves thereon to have an angularity well within the range recited in appellant’s claims.” *Id.* at 1072. This was contrasted with and distinguished from a situation in an earlier decision, *In re Wilson*, 312 F.2d 449 (CCPA 1963), in which “the attempted reliance was not only on a patent drawing per se, it was on a greatly enlarged section of a small drawing obviously never intended to show the dimensions of anything.” *Mraz*, 435 F.2d at 1072.

Here, while the written disclosure of Rozenkranc is silent with respect to whether the drawings are or are not to scale, Figure 1 itself provides an important clue that that drawing figure is intended to accurately represent the configuration of the device. The written disclosure notes that the angle between the shaving blades and trim blade is advantageously 85-95°, while Figure 1 not only shows the blades as being at an angle within that range, but also provides extension and dimension lines illustrating how that angle is determined and measured. (Rozenkranc, col. 1, ll. 61-63; Fig. 1).

Additionally, Rozenkranc, as noted above, discloses that the angle of the trim blade relative to its working plane is to be similar to the angle of the shaving blades to their working plane, which is consistent with the illustration in Figure 1. Rozenkranc also describes Figures 2, 2a, 3 and 3a as being schematic representations, but does not use that descriptor in describing Figures 1 and 4, thus providing an inference that these latter figures accurately portray the configuration of the device. (Rozenkranc, col. 2, ll. 5-18). Given these indicia of accuracy in the drawings, we find it was not error on the Examiner’s part to rely on Figure 1 of Rozenkranc as

² Presumably determined through the simple use of a protractor.

disclosing an included angle of intersection between the first and second working planes of “roughly 60°”. (Ans. 10).

As discussed above, we also fail to discern error in the remainder of the Examiner’s reasoning leading to the finding that the configuration of Rozenkranc in which the angle between the blades is increased to 120° will have an included angle of intersection between the first and second working planes that is within the range set forth in claim 21.

Claim 30 depends indirectly from claim 21 and requires that an elongated handle attached to the razor cartridge have a curve at an end attached to the razor cartridge, with the curve being concave on the same side as the first blade group. Appellant contends that, in Rozenkranc, the curve at the end is convex. (Appeal Br. 18). The Examiner maintains that the end of the handle has both a concave curve on the same side as the second blade group (convex to the side of the first blade group) and a concave curve on the same side as the first blade group. (Ans. 10).

We conclude that the broadest reasonable interpretation of “an end [of the handle] attached to the razor cartridge” is sufficiently broad as to encompass the entire extent of the curved sections at the end of the handle attached to the razor cartridge in Rozenkranc. Given that there must be some length to the curved part of the handle in order for it to indeed be curved, the claimed “end” would not reasonably be construed as essentially being synonymous with “tip” or another like term. Rather, “end” is essentially synonymous with “end portion”. The end portion of the Rozenkranc device that is attached to the razor cartridge contains both curves.

Appellant describes generically that “improved comfort and ease of use” result from the provision of the concave curved section. (Appeal Br. 18). The concave curved part of the Rozenkranc handle, while being spaced from the razor cartridge by the convex curved part, appears to be sufficiently close to the cartridge to provide the same level of comfort and ease of use as may be found in Appellant’s device set forth in claim 30.

Appellant has attempted to submit evidence, and has presented arguments, that appear to be directed to secondary considerations alleged to weigh in favor of non-obviousness of the claimed invention. (Appeal Br. 11-13; Evidence Appendix 30-32). The Evidence Appendix to the Appeal Brief included information in the form of images and descriptions directed to the Gillette Fusion and Schick Quattro razors. Neither the Appeal Brief nor the Appendix itself included a statement complying with 37 C.F.R. § 41.37(c)(1)(ix), setting forth where in the record that the evidence was entered in the record by the Examiner. The Evidence Appendix included only a statement that Appellant had submitted a separate paper seeking entry of the evidence into the record. (Appeal Br. 30). We were not able to find any documentation or indication that the proffered evidence was ever entered into the record and will thus not address the evidence.

Appellant’s arguments accompanying the proffered evidence appear to be in the nature of the recognized secondary considerations of copying by others or possibly of providing a solution to a long felt need. (Appeal Br. 11-13). Appellant argues that despite being the assignee of the Rozenkranc patent, Gillette markets a razor that does not use the Rozenkranc geometry, but instead uses the working plane geometry and handle configuration set forth in Appellant’s claims. Appellant further contends that Schick, in

response to the introduction of the Gillette product, also introduced a product having Appellant's claimed working plane geometry and handle configuration.³

Appellant's arguments, even in combination with the evidence proffered, fall far short of establishing that Gillette and/or Schick copied Appellant's claimed invention. At the threshold, Appellant has failed to establish that either Gillette or Schick were even aware of Appellant's invention. Furthermore, evidence merely that the claimed invention was copied does not command that substantial weight be given in favor of nonobviousness of the claimed invention. *Cable Elec. Prods, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1028 (Fed. Cir. 1985), overruled on other grounds by *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1358-61 (Fed. Cir. 1999) (en banc)(improper to give much weight in obviousness analysis where poor showing as to copying was presented and where record was barren as to "nexus" between any copying arguably shown and nonobviousness of the claimed invention).

Appellant contends that Gillette's commercial activity evidences a recognition that the Rozenkranc design has many shortcomings that are overcome by Appellant's claimed design. (Appeal Br. 12). To the extent

³ Appellant further contends that both the Gillette and Schick products copy the thin leading-edge blade guard for the trim blade. (Appeal Br. 12). While this contention ostensibly pertains to rejected claim 31, we note that the contention, and any evidence that might support the contention, are not probative of error in the finding that claims 41-44 are anticipated by Rozenkranc. The Examiner found the limitation in claim 40 directed to a thin-profile leading edge blade guard to be explicitly disclosed by Rozenkranc. As discussed *supra*, we agree. Evidence of secondary considerations is not relevant to rejections under 35 U.S.C. § 102.

that this argument is intended to establish that there was a long felt need or prior failure by others that was solved by the claimed invention, the argument, even accompanied by the proffered evidence, fails to do so. No evidence of any such prior failures, nor of the particular problem and timeframe/duration of the recognized problem was advanced by Appellant.

The rejections of claims 21 and 30, and of claims 22, 24-27, 31, 32 and 40 depending from claim 21, will be sustained.

Claims 41-44--Anticipation--Rozenkranc

Appellant argues these claims as a group, therefore we will take claim 41 as being representative, with claims 42-44 standing or falling with claim 41.

Appellant assigns error to the Examiner's finding that Rozenkranc discloses the claimed "leading-edge blade guard [of the second blade group] having a thin profile to allow a distance between the at least one razor blade and an individual's skin to be optimally minimized to facilitate shaving in confined hard-to-reach areas of the individual's skin." (Appeal Br. 19-24). More specifically, while the Examiner regards only the structure located at the leading edge of the second blade group in Rozenkranc as meeting the claim limitation⁴, Appellant argues that the leading-edge blade guard of Rozenkranc includes not only the structure relied on by the Examiner, but also "more than one half of [the] broad [working] plane". (Appeal Br. 19).

⁴ The Examiner's Answer, at page 8, presents a marked-up version of Figure 1 of Rozenkranc, on which the Examiner includes reference numeral 400a and a lead line pointing to the structure regarded as corresponding to the claimed leading edge blade guard, as well as dimensional lines illustrating the thin profile (annotation "TP") of leading edge portion 400a. (Ans. 8; see also Ans. 4 and 11-12 presenting the Examiner's position in this respect).

Appellant thus urges that the blade guard of Rozenkranc is not thin, but is instead broad, in the context of its span along the second blade group.

(Appeal Br. 21). Appellant's argument effectively concedes that the structure identified by the Examiner as corresponding to the leading-edge blade guard does meet the limitation of having a "thin profile".

Other than being characterized as having a thin profile, the blade guard of claim 41 is not defined with any particular structural limitations. Accordingly, the meaning of the term "blade guard", as Appellant puts it, is that "[t]he blade guard must act as a guard for the blade . . .". (Reply Br. 6). Claim 41 does recite a positional limitation for the blade guard, namely that it be a "leading-edge" blade guard. It is not contested that the portion identified by the Examiner as the structure in Rozenkranc as corresponding to the claimed blade guard, is at the leading edge of the second blade group. Appellant argues that this structure, by itself, does not actually guard the blade. (Reply Br. 5-6).

Even assuming, *arguendo*, that Appellant's assertion is correct, claim 41 does not require that the "leading-edge blade guard" be the only structure forward of the blade that contributes to guarding the blade. It is not unreasonable to construe Rozenkranc as providing a leading edge blade guard operating in conjunction with blade guards disposed laterally of the blade (represented in the cross-section or cutaway view of Figure 1 by the line extending fore and aft of the blade 4) and extending from the leading edge guard to the trailing end of the second working plane. As the structure at the leading edge contributes to guarding the blade, it can logically be considered to be, and called, a "leading-edge blade guard". No structural

limitations directed to the “leading-edge blade guard” in claim 41 preclude such an interpretation, or render it unreasonable.

Accordingly, we find that the Examiner did not err in regarding only the structure found at the leading edge of the second working plane in Rozenkranc corresponds to the claimed leading-edge blade guard having a thin profile. The additional functional language in claim 41, directed to allowing a distance to be minimized and facilitating shaving in confined areas, is, according to Appellant, enabled by the provision of a thin profile leading-edge blade guard, and thus the Rozenkranc construction provides the same capability.

The rejection of claims 41-44 as anticipated by Rozenkranc will be sustained.

CONCLUSION

The Examiner correctly concluded that the recitation in claim 41 of “wherein the second blade group further includes a blade platform”, in light of a prior recitation of the second working plane “being defined by a blade platform”, renders that claim indefinite.

The Examiner correctly concluded that the subject matter of claim 21 would have been obvious to a person of ordinary skill in the art.

The Examiner correctly concluded that the subject matter of claim 30 would have been obvious to a person of ordinary skill in the art.

The Examiner correctly found that the Rozenkranc patent discloses a second blade group having a thin profile leading-edge blade guard.

DECISION

The decision of the Examiner to reject claims 21, 22, 24-27, 30-32 and 40-44 as being unpatentable is **AFFIRMED**.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

JRG

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